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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1316

2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS, and FRANK CORN, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

## PETITION FOR REHEARING

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## PETITION FOR REHEARING

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Petitioners, Perry R. Bass, John B. Connally and Howell E. Smith, executors of the Estate of S. W. Richardson, Deceased (the original condemnee), respectfully pray that this Court grant rehearing of its Order of April 19, 1971, denying the Petition for Writ of Certiorari (39 U.S.L. Week 3453), and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case as prayed for in the Petition filed February 5, 1971, herein.

### REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. Rehearing is called for by an opinion of this Court which was rendered on March 2, 1971—almost a month after our Petition was filed. In *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 39 U.S.L. Week, 4287

(No. 1066), the Court was dealing with a number of statutes, including The National Environmental Policy Act, but most particularly with the Department of Transportation Act of 1966 and with the Federal-Aid to Highway Act of 1968. The case involved a proposed six-lane highway through a public park in Memphis, Tennessee. The route through the park had been approved by the Bureau of Public Roads in 1956 and by the Federal Highway Administrator in 1966, and the acquisition of right-of-way had been approved by the Secretary of Transportation in 1967—all prior to the effective date of the Transportation and Federal-Aid statutes. These statutes required the Secretary to approve the proposed use of the parkland for a highway only where there were no feasible alternative routes or where feasible alternative routes involved uniquely difficult problems. Although the Secretary did approve the proposed use, he did not indicate the grounds for his decision. This Court said:

> Even though there is no *de novo* review in this case and the Secretary's approval of the route of I-40 does not have ultimately to meet the substantial evidence test, the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry. Certainly, the Secretary's decision is entitled to a presumption of regularity. * * * But that presumption is not to shield his action from a thorough, probing, in-depth review.
>
> The court is first required to decide whether the Secretary acted within the scope of his authority. * * * Also involved in this initial inquiry is a determination of whether on the facts the Secretary's decision can reasonably be said to be within the range [of choices he can make]. The reviewing court must consider whether the Secretary properly construed his authority to approve the use of parkland as limited to situations where

there are no feasible alternative routes or where feasible alternative routes involve uniquely difficult problems. And the reviewing court must be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems.

Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." * * * To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. * * *

Thus it is necessary to remand this case to the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard. [Footnote deleted.]

We respectfully submit that there is no possible way to square the holding and the Court's language in *Overton Park* with the holding and language of the Fifth Circuit in the instant case. Obviously, there would be no point in the "thorough, probing, in-depth review" of whether the Secretary acted within the scope of his authority in *Overton Park* unless the grounds chosen by the Secretary for his decision were

relevant. Although the statutes in the two cases are different as to the *standards* to be applied by the appropriate official, the scope of authority to act is the same under both statutes. Moreover, the Court ordered an inquiry into whether the Secretary "acted within the scope of his authority," whether he "properly construed his authority," whether his grounds were reasonable, whether his decision "was based on a consideration of the relevant factors," and whether there was "a clear error of judgment." Again, such an inquiry would be meaningless if the Secretary could, without challenge, state one ground for his decision when in fact his real ground, intent and purpose were entirely different.

In the instant case, despite uncontradicted evidence in the record and uncontested findings by the District Court that the Secretary of the Army and the Corps of Engineers intended the area above el. 697.1 to be taken for recreational purposes and deliberately kept this purpose secret,[1] the Fifth Circuit refused to "substi-

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[1] Compare *United States* v. *0.01 Acre of Land,* 310 F. Supp. 1379, 1386 (D. Md. 1970), where the court approved the taking only because there was "no inconsistency between the proposed use of the property and the authority for the taking, as set forth in the complaint and the Declaration of Taking, and the actual use which the Government intends to make of the property." See also *United States* v. *327 Acres of Land,* 320 F. Supp. 844, 848 (N.D. Ga. 1971), where the court, in considering the issue of enhanced value, held that "the taking of these tracts was not included in the public project from the beginning and the lands were not 'probably within the scope of the project from the time the Government was committed to it.'" Finally, see *Town of Brookline* v. *Metropolitan District Commission,* 258 N.E. 2d 284 (Mass. 1970), in which the court was considering a park in Brookline and issued an injunction against a proposed use. The court said: "The principle that land appropriated to one public use cannot be diverted to another inconsistent use without plain and explicit legislation to that end has been well established in our decisions."

tute its judgment for that of the Corps of Engineers" (App. to Petition, p. 92a). The Fifth Circuit said:

> The court should not and may not interfere with the exercise of the discretion given to these experts [of the Corps of Engineers]. We therefore conclude that it was beyond the judicial power of the district court to inquire into the necessity for taking the area above elevation 697.1. Consequently, the court could not use its finding of non-necessity to support its ultimate conclusion that the taking was solely for recreational purposes and therefore unauthorized. [*Ibid.*]

Surely the Secretary of Transportation is as much an expert on highways as the Corps of Engineers is on recreational areas. Yet this Court in *Overton Park* did not feel compelled to defer to the Secretary's announced approval of the highway; it ordered the District Court to go behind that approval and make a "thorough, probing, in-depth review" of the basis of the approval. That case calls for reversal in this one.

2. A second reason why rehearing should be granted is that this Court has granted certiorari in a case which raises questions directly bearing on the outcome of the instant case. This Court granted certiorari in *Sierra Club* v. *Hickel,* Oct. Term 1970 No. 939, on February 3, 1971 (39 U.S.L. Week 3359), two days before our own Petition was filed. Questions 5, 6 and 9 in that case read:

> 5. May the Secretary of the Interior authorize others to construct a major connecting link highway across Sequoia National Park for a non-park purpose?
>
> 6. May a statute requiring Congressional approval of any transmission line located in Sequoia National Park be ignored by the Secretary of the Interior?

> 9. May the Secretary of Agriculture authorize a huge private resort development in a national game refuge without first finding the proposed use consistent with the mandate of Congress in creating the refuge?

As the Ninth Circuit put it in that case:

> On the merits, the Sierra Club contends that the Secretary of Agriculture who has the responsibility under Congress for management of the national forests has exceeded his authority and has acted illegally as well as arbitrarily and capriciously in approving the master plan proposed by Disney. [433 F.2d at 27.]

A decision on the merits by this Court in favor of the Sierra Club would almost certainly affect the disposition of the instant case, and yet if rehearing is not granted here, the case may be mooted by the action of the Corps of Engineers in relation to the property under consideration.

3. There is still another reason why rehearing should be granted. Our Petition was directed to the unconstitutional taking of petitioners' land, in view of the fact that the real purpose of the taking (for recreational use) was hidden, and the project as built was so radically different from the one authorized by Congress as to amount to an unauthorized project. It would have been inappropriate to argue in that Petition that the project was a proper one under the Constitution but nevertheless required a statement from the Secretary of the Army with respect to the environmental impact involved. In his dissent to the denial of the Petition,[2] however, Mr. Justice Douglas correctly

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[2] See also the dissenting opinions of Justices Black, Douglas and Brennan from the denial of certiorari in *Antonio Conservation Society* v. *Texas Highway Dept.*, Oct. Term 1970, No. 1101, 39 U.S.L. Week 3269, December 21, 1970.

pointed out that The National Environmental Policy Act, 42 U.S.C. § 4331, "requires environmental impact statements for proposed projects. So far as we are advised, no such statement has been filed" (footnote deleted). The Justice is correct. Work will soon begin on the recreational portion of petitioner's land, and yet no statement has been filed, although clearly required by the Act.

The force and effect of this Act are demonstrated by *Zabel* v. *Tabb,* 430 F.2d 199 (5th Cir. 1970), in which this Court denied certiorari on February 22, 1971 (39 U.S.L. Week 3360, No. 955), over two weeks after our Petition was filed. In *Zabel,* the Secretary of the Army "and his functionary, the Chief of Engineers," denied a permit to fill in eleven acres of tidelands in Boca Ciega Bay, Florida, for use as a commercial mobile trailer park. The denial was based on potential damage to the ecology. The Court of Appeals reversed a District Court order that the permit be granted. In relying strongly on The National Environmental Policy Act, the court said:

> Although this Congressional command was not in existence at the time the permit in question was denied, the correctness of that decision must be determined by the applicable standards of today. The national policy is set forth in plain terms in § 101 and the disclaimer of § 104(3) neither affects it nor the duty of all departments to consider, consult, collaborate and conclude. For we hold that while it is still the action of the Secretary of the Army on the recommendation of the Chief of Engineers, the Army must consult with, consider and receive, and then evaluate the recommendations of all of these other agencies articulately on all these environmental factors. In rejecting a permit on non-navigational grounds, the Secretary of the

> Army does not abdicate his sole ultimate responsibility and authority. Rather in weighing the application, the Secretary of the Army is acting under a Congressional mandate to collaborate and consider all of these factors. [199 F.2d at 213; footnote deleted.]

There can be no question but that the Act applies to all projects, regardless of when initiated. In *Environmental Defense Fund, Inc.* v. *Corps of Engineers,* E.D. Ark., No. LR-70-203, February 19, 1971, for example, the court held the Act applicable to a project two-thirds completed, pointing out that Congress intended for the Corps "to objectively evaluate all of their projects, regardless of how much money has already been spent thereon and regardless of the degree of completion of the work."[3]

As the court in that case noted, a memorandum from Deputy Secretary of Defense David Packard, dated August 8, 1970, directed to the Secretary of the Army, entitled, "Interim Guidelines on Environmental Statements," stated in part:

> e. Projects or Programs Initiated Before January 1, 1970.—Consistent with the above guidelines, an environmental statement shall be filed on actions significantly adversely affecting the quality of the environment even though the actions arise from projects or programs initiated prior to the enactment of the NEPA on January 1, 1970. Where it is not practicable to reassess the basic course of action, further incremental major actions should take into account environmental consequences not fully evaluated at the outset of this project or program.

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[3] Earlier cases holding to the contrary are *Brooks* v. *Volpe,* W.D. Wash., No. 9144, September 25, 1970; *Investment Syndicates, Inc.* v. *Richmond,* 318 F. Supp. 1038 (D. Ore. 1970).

Similarly, the Guidelines as finally published in the Federal Register only last month provide:

> 11. Application of section 102(2)(C) procedure to existing projects and programs. To the maximum extent practicable the section 102(2)(C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of envorinmental consequences not fully evaluated at the outset of the project or program. ["Statements on Proposed Federal Actions Affecting the Environment", 36 Fed. Reg. 7724, 7727 Par. 11 (1971).]

Another recent and important case along similar lines is *Environmental Defense Fund* v. *Corps of Engineers,* D.D.C., Civ. No. 2655-69, January 21, 1971, in which the District Court for the District of Columbia issued a preliminary injunction restraining the continued construction of the Cross-Florida Barge Canal. Plaintiffs' claim was that the Canal, although duly authorized was being constructed in violation of a number of statutes, including The National Environmental Policy Act. In granting the injunction, the court rejected the Government's contention that the Act did not apply to the Canal (authorized in 1942 and begun in 1964), and stated:

> The NEPA recognizes a "continuing responsibility of the Federal Government" to strive to preserve and enhance the environment, and requires a detailed and systematic impact of Federal actions.

And in *Texas Committee on Natural Resources* v. *United States,* W.D. Tex., No. A-69-CA-119, February 5, 1970, the court held the Act to have retroactive application.

Only by a grant of rehearing can the Corps of Engineers be prevented from proceeding with a project which most assuredly will have a substantial ecological impact but as to which no ecological consideration has been given, as required by law.

## CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a Writ of Certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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**Certification**

This is to certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that the Petition is restricted to the grounds numbered 1-3 in said Petition, which are confined to intervening circumstances of substantial or controlling effect or to other substantial grounds available to petitioners although not previously presented.

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